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Locknie HSU

Singapore Management University, lockniehsu@smu.edu.sg

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EU-ASEAN Trade and Investment Relations with a Special Focus on Singapore

Locknie Hsu

Europe's contact with East Asia goes back further than any other region in the world. It could be traced to Marco Polo's historic journey to China 800 years ago. [...] East Asia and the EU share a common vision for the future. They want to build a peaceful and prosperous multipolar world. They accept globalization but also want to live in a world of cultural diversity. East Asia and Europe want economic growth, but they also value social equity, a healthy environment and a rich cultural life.—H.E. Ambassador Tommy T.B. Koh, *Europe and East Asia Need to Get Acquainted*, *International Herald Tribune*, 14 April 2000¹

Introduction

The European Union (EU) and the Association of Southeast Asian Nations (ASEAN) are two dynamic trade and investment blocs, each of which has been working toward regional integration. The long and rich EU integration process has been an interesting model and naturally, many, including ASEAN, study the EU system for lessons to be drawn.² Both regions aim for peace and economic development and consist of diverse economic and social memberships.

¹ Republished in Lay Hwee and Latif (2000), pp. 107–109. Among his many other honorable titles, Amb. Koh is currently Ambassador-At-Large at the Ministry of Foreign Affairs, Singapore, and was also Ambassador to the US (1984–1990), founding Executive Director of the Asia-Europe Foundation, and Singapore's Chief Negotiator for the US-Singapore Free Trade Agreement (2000–2003).

² It is beyond the scope of this article to chronicle the long history and extensive integration initiatives of the EU which have been examined in a great deal of academic literature; see for

L. Hsu (✉)

Professor, School of Law, Singapore Management University, 60 Stamford Road, Level 4,
Singapore 178900, Singapore

e-mail: lockniehsu@smu.edu.sg

ASEAN was formed in 1967 by five founding States, Indonesia, Malaysia, the Philippines, Singapore, and Thailand, with a view to promoting regional peace and stability.³ The economic integration impetus began about two decades afterward, beginning with plans for an ASEAN Free Trade Area to promote trade and investment liberalisation, including the elimination of tariff and non-tariff barriers to intra-ASEAN trade.⁴ The formal treaty process to realise these objectives took place in 1992 with the introduction of a *Common Effective Preferential Tariff* (CEPT) system for the then members.⁵ Plans for an ASEAN Investment Area were established in 1998.⁶ In 2009, ASEAN members signed a landmark *ASEAN Comprehensive Investment Agreement* (ACIA).⁷ In 2008, aiming to strengthen the legal architecture of the Association, ASEAN members adopted the *ASEAN Charter*, setting out the Association's purpose, objectives, the legal framework of its institutions, and provisions for dispute settlement.⁸

ASEAN integration has proceeded in developing three pillars, giving rise to the ASEAN Economic Community (AEC), ASEAN Socio-Cultural Community (ASCC) and the ASEAN Political-Security Community (APSC).⁹ In recent years, ASEAN has accelerated economic integration to establish the ASEAN Economic

example, Jones et al. (2012); Dedman (2010); Dosenrode (2012). For a quick overview, see http://europa.eu/about-eu/eu-history/index_en.htm. For information on the EU's global policy, see generally: http://trade.ec.europa.eu/doclib/docs/2010/november/tradoc_146941.pdf.

³ The founding document is the ASEAN Declaration, also known as the Bangkok Declaration, signed 8 August 1967, available at: <http://www.asean.org/news/item/the-asean-declaration-bangkok-declaration>.

⁴ See Framework Agreement on Enhancing ASEAN Economic Cooperation, signed on 28 January 1992, and Framework Agreement on the ASEAN Investment Area, signed on 7 October 1998; texts of these and other related agreements and protocols are available at: <http://www.asean.org/communities/asean-economic-community/category/asean-trade-in-goods-agreement> and <http://www.asean.org/communities/asean-economic-community/category/overview-14>. See also generally ASEAN website at: <http://www.asean.org/communities/asean-economic-community/category/asean-free-trade-area-afta-council>.

⁵ The members in 1992 were Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand. Cambodia, Lao PDR, Myanmar and Vietnam subsequently joined ASEAN in 1999, 1997, 1997 and 1995, respectively.

⁶ Framework Agreement. See also generally the information at the Singapore Government website, at: http://www.fta.gov.sg/afta/9basean_investment_area.pdf.

⁷ The text of the ACIA is available at: <http://www.asean.org/images/archive/documents/FINAL-SIGNED-ACIA.pdf>; the treaty came into force on 29 March 2012. It superseded two earlier, more limited, investment treaties. See generally: <http://www.asean.org/communities/asean-economic-community/category/asean-investment-area-aia-council>.

⁸ See Charter of the Association of Southeast Asian Nations, available at: <http://www.asean.org/asean/asean-charter/asean-charter>.

⁹ See Roadmap for an ASEAN Community 2009–2015, ASEAN, available at: <http://www.asean.org/resources/publications/asean-publications/item/roadmap-for-an-asean-community-2009-2015>.

Community (AEC) by 2015 pursuant to the ASEAN Economic Community Blueprint, to establish ASEAN as a single market and production base.¹⁰

In tandem with these developments, members of ASEAN also engaged in bilateral and regional trade liberalisation and integration initiatives, by way of free trade agreements (FTAs) and bilateral investment agreements (BITs). Among ASEAN members, Singapore was an early participant in FTAs, with its first FTA being signed with New Zealand in 2000.¹¹ She has, over the past 15 years, pursued a “dual-track” approach to trade negotiations at the multilateral and bilateral/regional levels.¹²

As the number of bilateral FTAs was growing, ASEAN members also began to engage in FTAs with external partners, namely Australia, New Zealand, China, India, Korea and Japan.¹³ Presently, ASEAN is negotiating a Regional Comprehensive Economic Partnership (RCEP) agreement with these six partners.¹⁴

EU-ASEAN Trade and Investment and Singapore’s Role

After the US and China, ASEAN as a whole is the EU’s third largest trade partner, with trade in goods and services exceeding €206 billion in 2011.¹⁵ Conversely, after China, the EU is ASEAN’s second largest trade partner. In investment, the EU has invested an average of €9.1 billion in ASEAN over the period of 2000–2009.¹⁶

Within ASEAN, Singapore, a trade and investment hub, is the largest trading partner of the EU in the ASEAN bloc, accounting for one-third of EU-ASEAN trade.¹⁷ At the end of 2011, Europe and Asia were the top two sources of FDI in Singapore. Between the end of 2001 and the end of 2011, EU FDI in Singapore tripled from S\$85b to S\$252b.¹⁸ Among EU members, the top FDI investors in Singapore were, between 2001 and 2011, the Netherlands and the United

¹⁰ The original target for the AEC was 2020; the members decided in January 2007 at the 12th ASEAN Summit in Cebu, Philippines, to accelerate this date to 2015. The Blueprint (2008) is available at: www.asean.org/archive/5187-10.pdf.

¹¹ See Singapore Ministry of Trade & Industry website: http://www.fta.gov.sg/fta_anzscep.asp?hl=9.

¹² For information on the Singapore Government’s policy on this, see the Ministry of Foreign Affairs website at: http://www.mfa.gov.sg/content/mfa/international_organisation_initiatives/ftas.html. For information on Singapore’s FTAs that are in force, see generally www.fta.gov.sg.

¹³ For the FTAs in force in ASEAN, see generally the Singapore Ministry of Trade & Industry website at: http://www.fta.gov.sg/sg_fta.asp.

¹⁴ See information sheet of the Singapore Government on the RCEP, 2012, available at: http://www.fta.gov.sg/press_release%5CFACTSHEET%20ON%20RCEP_final.pdf.

¹⁵ See European Commission (Trade), Association of Southeast Asian Nations (ASEAN), available at: <http://ec.europa.eu/trade/policy/countries-and-regions/regions/asean>.

¹⁶ European Commission (Trade), Association of Southeast Asian Nations (ASEAN), available at: <http://ec.europa.eu/trade/policy/countries-and-regions/regions/asean>.

¹⁷ See European Commission (2013a), p. 16.

¹⁸ Ying and Tan (2001–2011), p. 2, available at: http://www.singstat.gov.sg/publications/publications_and_papers/investment/ssnsep13-pg1-9.pdf.

Kingdom.¹⁹ On the other hand, Singapore invested 14 % of her outward FDI stock in Europe, with the major destinations being the United Kingdom, the Netherlands and Switzerland.²⁰

Given that the EU is the largest investor in ASEAN,²¹ it has a natural interest in ensuring a conducive trade and investment environment and appropriate legal protection for its investors.

Efforts were initially made to negotiate a region-to-region EU-ASEAN FTA, with seven ASEAN members but these have not led to an agreement.²² Consequently, the EU re-launched negotiations with individual ASEAN members.²³ The first of these members has been Singapore. As the EU Trade Commissioner, Karel de Gucht, said: “The launch of FTA negotiations with Singapore, for us, marks the beginning of a deeper engagement with Asia, and in particular our relations with the ASEAN region.”²⁴

The EU and Investment Negotiations, Post-Lisbon Treaty

Through the Lisbon Treaty, the EU now has exclusive competence regarding its Common Commercial Policy which includes FDI.²⁵ This means that the EU is able to negotiate investment agreements with third party states. This watershed

¹⁹ Ying and Tan (2001–2011), p. 3, Table 2, available at: http://www.singstat.gov.sg/publications/publications_and_papers/investment/ssnsep13-pg1-9.pdf.

²⁰ Ying and Tan (2001–2011), pp. 6–7, Table 8, available at: http://www.singstat.gov.sg/publications/publications_and_papers/investment/ssnsep13-pg1-9.pdf.

²¹ European Commission (Trade), Association of Southeast Asian Nations (ASEAN), available at: <http://ec.europa.eu/trade/policy/countries-and-regions/regions/asean>.

²² According to the EU’s Progress Report on the Global Policy 2006–2010, 2010, p. 8, the reasons were as follows:

Following Member States’ authorisation to negotiate, “region-to-region”, FTA negotiations with a group of seven (out of ten) ASEAN countries were launched in 2007. Until March 2009, nine negotiation rounds had been held. However, progress in these region-to-region negotiations was slow, and both sides agreed to put negotiations on hold in March 2009. One difficulty in the region-to-region negotiations arose from significant structural differences within ASEAN, which meant that existing levels of liberalisation and negotiation objectives differed widely among countries in the group.

²³ EU’s Progress Report on the Global Policy 2006–2010, 2010, p. 23.

²⁴ EU Trade Commissioner (2010).

²⁵ See Article 2 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, [2007] OJ C 306/1, adding a new Article 2B to the Treaty establishing the European Community—the new Art. 2B(1)(e) attributes exclusive competence over to the Union over the common commercial policy. Article 207 of the Treaty on the Functioning of the European Union (TFEU), [2012] OJ C 326/1, in turn, includes FDI matters within the scope of the common commercial policy; and Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth, COM(2010) 2020 final, p. 11. See also the Regulation (EU) No

development has unlocked new opportunities for engagement in trade and investment matters with ASEAN/Asian States. As described in the EU document, *Towards a Comprehensive European International Investment Policy*, investment is a “new frontier” for the EU’s Common Commercial Policy.²⁶

The EU’s Recent Negotiations in Asia: A Brief Overview

As the twentieth century came to a close, it was clear that the EU was becoming increasingly interested in developing stronger trade and investment relations with Asia. The European Commission’s September 2001 Communication, *Europe and Asia, a Strategic Framework for Enhanced Partnerships*, laid the foundation of renewed EU-Asian ties at the beginning of the twenty-first century.²⁷ This was followed not long after, by a more specific Communication, *A New Partnership with Southeast Asia*, issued in 2003.²⁸ This latter document spelt out six “strategic priorities” for such enhanced ties, including the injection of a “new dynamism” into regional trade and investment relations.²⁹ This included establishment of a “trade action plan” known as the *Trans-Regional EU-ASEAN Trade Initiative* (TREATI).

At about roughly the same time, by way of the broader context, the US and Singapore were negotiating a landmark FTA; the first by the US with an ASEAN member, as part of the Asian trade and investment agenda of then President George W. Bush.³⁰ By 2004, Singapore had signed the United States-Singapore FTA (USSFTA). No doubt, these developments were being watched with keen interest by EU policy makers.

1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, [2012] OJ L 351/40, governing transitional matters on members’ BITs.

²⁶ European Commission, Communication, *Towards a Comprehensive European International Investment Policy*, COM(2010)343 final, p. 4. For an overview of EU investment policy, see European Commission (Trade), Investment, available at: <http://ec.europa.eu/trade/policy/accessing-markets/investment/>.

²⁷ European Commission, Communication, *Europe and Asia: A Strategic Framework for enhanced Partnership*, COM(2001)469 final.

²⁸ European Commission, Communication, *A new partnership with South East Asia*, COM (2003) 399/4.

²⁹ European Commission, Communication, *A new partnership with South East Asia*, COM (2003) 399/4, pp. 3–4.

³⁰ See United States Trade Representative, *The President’s 2008 Trade Policy Agenda*, pp. 9–10, available at: http://www.ustr.gov/archive/assets/Document_Library/Reports_Publications/2008/2008_Trade_Policy_Agenda/asset_upload_file490_14556.pdf. For a Singapore perspective, see also Koh and Lin (2004). The US signed a *US-ASEAN Trade and Investment Framework Agreement* in 2006, available at: http://www.ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file932_9760.pdf.

In April 2007, the EU adopted a mandate for FTA negotiations with ASEAN. However, attempts to negotiate an FTA with ASEAN as a whole met with difficulties³¹ and the EU subsequently decided to adopt a more limited approach with individual countries of ASEAN.³² In 2009, the Commission was therefore further authorised to negotiate FTAs with individual ASEAN members.³³ Plans for an EU-ASEAN FTA have been in abeyance but the EU's position is that an EU-ASEAN FTA remains the ultimate goal.³⁴ With ASEAN members busy preparing for the AEC deadline of 2015, it was recently reported that ASEAN will resume negotiations with the EU *after* the establishment of the AEC.³⁵

In March 2010, negotiations for an EU-Singapore Free Trade Agreement (EUSFTA) were launched. The EU's negotiating mandate was modified in 2011 to permit investment negotiations for the EUSFTA.³⁶ By December 2013, the EU had completed negotiations for this, its first-ever FTA with an ASEAN country. This is also its first FTA with an Asian State that will contain an *investment* chapter. Before this, the EU had completed negotiations with Canada and Korea.³⁷ It presently has ongoing negotiations with China,³⁸ India,³⁹ Japan,⁴⁰

³¹ The signalling of the start of talks for an EU-ASEAN FTA was made in the Joint Ministerial Statement of the ASEAN Economic Ministers and the European Union Trade Commissioner on the Launch of the Negotiations of the ASEAN-EU Free Trade Agreement (FTA), 4 May 2007, see www.asean.org/archive/ASEAN-EU-FTA.pdf. According to this *Joint Statement*, the parties intended for the negotiating process to “be based on a region-to-region approach” and would consider “the different levels of development and capacity of individual ASEAN Member countries”, para. 3.

³² See European Commission (Trade), Singapore, available at: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/>.

³³ See European Commission, Memo, EU investment negotiations with China and ASEAN, available at: http://europa.eu/rapid/press-release_MEMO-13-913_en.htm.

³⁴ See European Commission (Trade) (2006).

³⁵ See Pratuangkrai (2014).

³⁶ European Commission, Memo, EU investment negotiations with China and ASEAN, available at: http://europa.eu/rapid/press-release_MEMO-13-913_en.htm.

³⁷ Although the EU had earlier concluded a FTA with Korea, that FTA does not include an investment chapter, as the new EU role in investment negotiations was still in gestation. The Lisbon Treaty, discussed below, was signed on 13 December 2007, *after* the EU-Korea FTA negotiations had been launched in May 2007. For the detailed timeline of the negotiations of the FTA, see the Korea Ministry of Foreign Affairs website at: http://www.mofa.go.kr/ENG/policy/fta/status/effect/eu/index.jsp?menu=m_20_80_10&tabmenu=t_2&submenu=s_6. The EU-Canada FTA (CETA) does, however, include an investment chapter.

³⁸ EU-China negotiations commenced in January 2014. See European Commission (Trade), EU and China begin investment talks, available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1013>; European Commission, Memo 13/913, EU investment negotiations with China and ASEAN, available at: http://europa.eu/rapid/press-release_MEMO-13-913_en.htm; and European Commission (Trade) (2006).

³⁹ Negotiations with India began in 2007 and 11 rounds have been held to date. Current meetings appear to comprise smaller cluster groups; see European Commission (Trade) (2006).

⁴⁰ Negotiations between the EU and Japan were launched in March 2013; see European Commission (Trade), Japan, available at: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/japan/>.

Malaysia,⁴¹ Thailand⁴² and Vietnam.⁴³ Explaining part of the thinking behind these negotiations, the EU stated recently:

... the EU's global competitors are currently negotiating preferences for their own companies, in the contexts of the *Trans-Pacific Partnership* and the *Regional Comprehensive Economic Partnership*. The EU, by negotiating preferential market access of its own, can protect EU exporters against a loss of competitiveness in many Asian markets resulting from the FTAs concluded by others.⁴⁴

It is noteworthy too, that Singapore views the TPP and RCEP as possible pathways to a larger Asia-Pacific free trade area.⁴⁵

EU-Myanmar

Over the last two years, because of a number of domestic reforms in Myanmar, trade and investment relations between the EU and Myanmar have thawed, and taken on a certain momentum.

The Council of the European Union approved in July 2013 a framework of policy for Myanmar, which envisages establishment of a “trade and investment partnership”, including reinstatement of Myanmar’s GSP preferences and negotiation of an Investment Agreement.⁴⁶ In 2013, the EU repealed legislation suspending Myanmar’s benefits under its GSP programme. Myanmar became a beneficiary of the EU’s *Everything But Arms* (EBA; duty-free quota-free access except for arms) programme as of 1 January 2014.⁴⁷

⁴¹ See European Commission (Trade), Malaysia, available at: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/malaysia/>.

⁴² Negotiations with Thailand began in 2013; see European Union, External Action, Thailand, available at: <http://eeas.europa.eu/thailand/> and European Commission (Trade), Thailand, available at: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/thailand> and European Commission (Trade) (2006).

⁴³ See European Commission (Trade), Vietnam, available at: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/>. For an overview of the EU’s FTAs, negotiations and launch dates, see generally European Commission, Enterprise and Industry, Free Trade Agreements, available at: <http://ec.europa.eu/enterprise/policies/international/facilitating-trade/free-trade/> and European Commission (Trade) (2006).

⁴⁴ Fact Sheet on the EU-Singapore FTA, European Commission, Memo 13/805, The EU-Singapore Free Trade Agreement, p. 3, available at: http://europa.eu/rapid/press-release_IP-13-849_en.htm.

⁴⁵ Information sheet of the Singapore Government on the RCEP, 2012, p. 3, available at: http://www.fta.gov.sg/press_release%5CFACTSHEET%20ON%20RCEP_final.pdf.

⁴⁶ See Council of the European Union (2013b), p. 4; see also Council of the European Union (2013a).

⁴⁷ See Regulation (EU) No 607/2013 of the European Parliament and of the Council of 12 June 2013 repealing Council Regulation (EC) No 552/97 temporarily withdrawing access to generalised tariff preferences from Myanmar/Burma, [2013] OJ L 181/13 and European Commission (Trade) (2014d).

While the EU has concluded other FTAs, the focus in this article is on the EUSFTA, and in particular, its investment obligations.

The EU-Korea FTA: The EU's First FTA with an Asian State

The EU-Korea FTA, which entered into force in July 2011, is the first FTA that the EU has signed with an Asian state but as its negotiations commenced before the conclusion of the Lisbon Treaty (which confers exclusive investment negotiation competence on the EU) it contains no investment chapter.⁴⁸

CETA: The EU's First Post-Lisbon FTA Containing Investment Provisions

The EU-Canada Comprehensive and Economic Trade Agreement (CETA), concluded on 18 October 2013, is the first post-Lisbon FTA with investment rules.⁴⁹ Before the release of the Investment Chapter of CETA, the EU published a *Fact Sheet* explaining key contents of this chapter.⁵⁰ The text of the Chapter was released in September 2014 as part of the consolidated text of the treaty.⁵¹ More will be said about these provisions below.

The EU-Singapore FTA: The EU's First Post-Lisbon FTA with an ASEAN/Asian State Containing Investment Provisions

According to a study of the economic benefits of the EUSFTA released on 24 September 2013, the EU views FTAs with individual ASEAN members, such as the EUSFTA, are “stepping-stones” or “building blocks” for an EU-ASEAN

⁴⁸ See European Commission (Trade), South Korea, available at: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/>. See also generally, Pollet-Fort (2011), EU Centre in Singapore, available at: <http://www.eucentre.sg/wp-content/uploads/2013/06/BackgroundBrief-The-EU-Korea-FTA-and-its-Implications-for-the-Future-EU-Singapore-FTA.pdf>.

⁴⁹ The text is available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=973>. For a recent critical analysis of the CETA's provisions as released to date, see Bernasconi-Osterwalder (2013).

⁵⁰ European Commission (2013c).

⁵¹ See European Commission (Trade) (2014a).

FTA.⁵² The EUSFTA is thus viewed as a trailblazer, set to spur further FTAs with other ASEAN member states.⁵³

Negotiations for the EUSFTA were launched in March 2010 and were completed by December 2012. An initialled text was released on 20 September 2013. The text of the Investment Chapter was released in October 2014.⁵⁴

The EUSFTA may be viewed as the EU's continuing process of investment rule-setting as it is likely to reflect many of the investment provisions that are in the CETA. Concerning investment protection with Asian (and other) partners will be explained in greater detail below. First, one must appreciate the current, broader EU investment treaty negotiating agenda, as explained in the next section.

A New Generation of EU Trade and Investment Agreements

General Philosophy

Certain themes and ideas are discernible in the EU's negotiating objectives for new FTAs.

First, the EU is mindful that non-EU partners are of diverse economic and developmental standing. Consequently, it has stated that it would be open to adapting negotiations to consider this. Specifically, in the Commission's Communication, *Towards a Comprehensive European International Investment Policy*, 2010, it was stated:

... a one-size-fits-all model for investment agreements with 3rd countries would necessarily be neither feasible nor desirable. The Union will have to take into account each specific negotiating context. The interests of our stakeholders as well as the level of development of our partners should guide inter alia the standards the Union sets in a specific investment negotiation. ...

The Union should go where its investors would like to go, just like it should pave their way abroad, through the liberalisation of investment flows. Markets with significant economic growth or growth prospects present a particular opportunity in the current increasingly competitive environment. It is important that EU investors have access to these markets and that amid the changes that these economies might be undergoing, benefit from the availability of sufficient guarantees for fair and predictable treatment. The EU's interests in investment negotiations would also be determined inter alia by the political, institutional and economic climate of our partner countries. *The 'robustness' of investor protection through either host country or international arbitration would be important determinants in defining priority countries for EU investment negotiations. In particular, the capacity and the practice of our partners in upholding the rule of law, in a manner that provides a certain and sound environment to investors, are key*

⁵² European Commission (2013a), pp. 9 and 12.

⁵³ The view has been expressed as follows: "The EUSFTA thus paves the way for comprehensive FTAs with other ASEAN countries, and ultimately an agreement with the entire region. [...] Singapore [...] regional trendsetter [...]"; European Commission (2013a), p. 3.

⁵⁴ European Commission (Trade) (2014b).

*determinants for assessing the value of investment protection negotiations.*⁵⁵ (Italic emphasis added.)

Secondly, in respect of dispute settlement, the EU seeks certainty and consistency under its FTAs:

The **atomisation of disputes and interpretations**. Consistency and predictability are key issues and the use of quasi-permanent arbitrators (as in the EU's FTA practice) and/or appellate mechanisms, where there is a likelihood of many claims under a particular agreement, should be considered; [...]⁵⁶

The lack of consistency between investor-State arbitral tribunals and the resulting uncertainty in the interpretation of core investment provisions (such as MFN clauses, for one) has led to a great deal of debate and calls for reforming the whole investor-state dispute settlement system that exists today.⁵⁷

While it appears from the above statements that the EU generally expects to include investor-State dispute settlement mechanisms (ISDS) in its treaties, it appears that there could be limited exceptions. In January 2014, the EU Trade Commissioner announced that the EU would hold consultations on its investment treaty dispute settlement provisions in the period leading up to the next negotiating round (in March 2014) for the Trans-Atlantic Trade and Investment Partnership (TTIP) with the US,⁵⁸ in light of several objections to ISDS being included.⁵⁹

Thirdly, the EU aims to have a *balance* between the right to regulate and the need to protect investors.⁶⁰ This is an important precept, particularly for the Asian states that are negotiating with the EU. Fourthly, the EU has outlined the scope and standards it seeks in ISDS in FTAs.⁶¹

Specific Guarantees Sought

Before the EUSFTA investment chapter was released to the public,⁶² and beyond the general contours sketched out in the Communication, the EU had made available a Fact Sheet on *Investment Protection and Investor-to-State Dispute Settlement*

⁵⁵ European Commission (2013a), pp. 6–7.

⁵⁶ European Commission (2013a), p. 10.

⁵⁷ See for example, this author's previous discussions in Hsu (2011), p. 827 and in Hsu (2014).

⁵⁸ See European Commission, Press Release 14/56, Commission to consult European public on provisions in EU-US trade deal on investment and investor-state dispute settlement, available at: http://europa.eu/rapid/press-release_IP-14-56_en.htm.

⁵⁹ There have been calls to exclude any ISDS mechanism in the TTIP: see for example Financial Times, EU and US Pressed to Drop Dispute-settlement Rule from Trade Deal, 10 March 2014. See also Ikenson (2014).

⁶⁰ European Commission (2013b), p. 3.

⁶¹ European Commission, Communication, Towards a Comprehensive European International Investment Policy, COM(2010)343 final, p. 8.

⁶² See Voskamp (2013).

in *EU Agreements* of November 2013⁶³ which provided important and useful indications of the chapter's likely contents.

With regard to treatment, the EU has spelt out the **four key guarantees for inclusion**: most favoured nation, national treatment, fair and equitable treatment, transfer of capital, expropriation provisions.⁶⁴ These will be buttressed by inclusion of an investor-State dispute mechanism.

With regard to the obligations relating to indirect expropriation and fair and equitable treatment (FET), the EU texts with both Canada and Singapore provide more detailed guidance on both these notions than before.⁶⁵ In several FTAs indirect expropriation is not defined, and it is only in some recent agreements that limitations on this obligation have begun to be included.⁶⁶

In the context of addressing indirect expropriation claims, the CETA and the EUSFTA, include provisions to safeguard a State's right to regulate and pursue legitimate public policy objectives.⁶⁷ Where that regulatory action is non-discriminatory and taken to protect the public interest, "the right of the state to regulate should prevail over the economic impact of those measures to the investor".⁶⁸ It remains to be seen as to what the actual treaty text will look like.

The CETA provides that a breach of the FET obligation arises in the following cases:

- Denial of justice in criminal, civil or administrative proceedings;
- Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings.
- Manifest arbitrariness;
- Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- Abusive treatment of investors, such as coercion, duress and harassment.⁶⁹

By comparison, the "scoping list" of the FET provision in the EUSFTA differs, stating the following:⁷⁰

2. To comply with the obligation to provide fair and equitable treatment set out in paragraph 1, neither Party shall adopt measures that constitute:

- (a) Denial of justice¹² in criminal, civil and administrative proceedings;
- (b) A fundamental breach of due process;

⁶³ European Commission (2013b).

⁶⁴ European Commission (2013b), p. 4.

⁶⁵ European Commission (2013b), pp. 7–10.

⁶⁶ European Commission (2013c).

⁶⁷ Annex X.11, CETA and Annex 9A, EUSFTA.

⁶⁸ European Commission (2013c), p. 7.

⁶⁹ European Commission (2013c); according to the Fact Sheet, this will "avoid too wide interpretations and provide clear guidelines to tribunals".

⁷⁰ Art. 9.4.2, EUSFTA. (Other differences in the FET provisions of the two agreements exist and can be appreciated only by reading both sets of provisions in full.)

- (c) Manifestly arbitrary conduct;
- (d) Harassment, coercion, abuse of power or similar bad faith conduct; or
- (e) A breach of the legitimate expectations of an investor arising from specific or unambiguous representations¹³ from a Party to induce the investment and which are reasonably relied upon by the investor.

¹³ For greater certainty, representations made to induce the investments include the representations made to convince the investor to continue with, not to liquidate or to make subsequent investments.

This list of guiding factors comes as no surprise, as they have been adopted by various arbitral tribunals in the past.⁷¹ In a way, this is a kind of “codification” of such tribunals’ reasoning of the FET standard. The language of the final text, however, and its exact scope, again, remain to be seen.

The negotiated text of the Investment Chapter of the EUSFTA was made publicly available in October 2014. The text, with other chapters, awaits “legal scrubbing” at this time of writing, and thereafter, ratification by the EU and implementing legislation in Singapore. The Chapter includes provisions addressing, *inter alia*, the following matters in relation to investor-State disputes:⁷²

- Prevention of claims by investors that are “manifestly without merit” and “unfounded as a matter of law”;⁷³
- Transparency in dispute proceedings; while the *UNCITRAL Rules on Transparency in Treaty-Based Arbitration* that came into effect in 2014⁷⁴ are explicitly made applicable in the CETA text, the EUSFTA incorporates its own, modified transparency provisions⁷⁵;
- A Code of Conduct for arbitrators and mediators;
- The possibility to consider in certain cases, an appellate mechanism⁷⁶;
- Provisions on the role of a Trade Committee to adopt interpretations of provisions in the EUSFTA.⁷⁷

Article 9.4 reflects the EU approach mentioned above, and relates fair and equitable treatment with some of the factors mentioned in the EU fact sheets, such as denial of justice in criminal, civil and administrative proceedings, a fundamental breach of due process and manifestly arbitrary conduct.

Art. 9.4.5 sets out a relatively specific provision on frustration or undermining of specific commitments made in written contractual agreements:

⁷¹ For useful overviews and case examples, see UNCTAD (2012); and OECD (2004), for examples.

⁷² EUSFTA (2013), pp. 8–9.

⁷³ Art. 9.23 and 9.24 of the EUSFTA Investment Chapter.

⁷⁴ UNCITRAL, Rules on Transparency in Treaty-Based Investor-State Arbitration, available at: <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

⁷⁵ See CETA, Art. X.33 and EUSFTA Art. 9.25 and Art. Annex 9.C.

⁷⁶ Art. 9.33.1 of the EUSFTA.

⁷⁷ Art. 9.33.2(b) and Art. 9.22.3 of the EUSFTA.

5. Where a Party, itself or through any entity mentioned in article 1 paragraph 5, had given any specific and clearly spelt out commitment in a contractual written obligation¹⁴ towards an investor of the other Party with respect to the investor's investment or towards such an investment, that Party shall not frustrate or undermine the said commitment through the exercise of its governmental authority¹⁵ either:

(a) deliberately; or

(b) in a way which substantially alters the balance of rights and obligation in the contractual written obligation unless the Party provides reasonable compensation to restore the investor or investment to a position which it would have been in had the frustration or undermining not occurred.

¹⁴ For the purposes of this paragraph, a "contractual written obligation" means an agreement in writing, entered into by both parties, whether in a single instrument or multiple instruments, that creates an exchange of rights and obligations, binding both parties.

¹⁵ For the purposes of this article, a Party frustrates or undermines a commitment through the exercise of its governmental authority when it frustrates or undermines the said commitment through the adoption, maintenance or non-adoption of measures mandatory or enforceable under domestic laws.

While this provision is not crafted in the form of a conventional, broadly-worded "umbrella clause", it does create a separate treaty obligation that could be violated in the manner set out in (a) and (b) in relation to contractual obligations between a State and an investor.

Notably, a provision in the CETA on expropriation and intellectual property rights (and an accompanying Declaration by the Parties) has not been included in the EUSFTA.⁷⁸

However, the EUSFTA Investment Chapter Annex provides as follows:

Annex 9-C to the Investment Protection Section

EXPROPRIATION AND INTELLECTUAL PROPERTY RIGHTS

For greater certainty, the revocation, limitation or creation of intellectual property rights, to the extent that these measures are consistent with TRIPS Agreement and Chapter 11 (Intellectual Property) of this Agreement, do not constitute expropriation. Moreover, a determination that these measures are inconsistent with the TRIPS Agreement and Chapter 11 (Intellectual Property) of this Agreement does not establish that there has been an expropriation.

Dispute Settlement

Apart from the above observations, which relate to interpretation under ISDS, the following are other features of ISDS under the EUSFTA.

⁷⁸ Art.X.11.6 of the CETA provides as follows: 6. For greater certainty, the revocation, limitation or creation of intellectual property rights to the extent that these measures are consistent with TRIPS and Chapter X (Intellectual Property) of this Agreement, do not constitute expropriation. Moreover, a determination that these actions are inconsistent with the TRIPS Agreement or Chapter X (Intellectual Property) of this Agreement does not establish that there has been an expropriation. The related Declaration is found at p. 185 of the CETA Consolidated Text, available at: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

To permit and encourage parties to consider the use of alternative dispute resolution methods, Chapter 16 of the EUSFTA provides for a *Mediation Mechanism*.⁷⁹ As not all ISDS provisions are accompanied by such explicit processes, the parties here appear to place emphasis on the availability and use of such means to settle disputes. Such a stance would be consistent with the general interest in the EU and in Singapore to promote the use of mediation.

Arbitration hearings will be open to the public, unless the two States decide otherwise.⁸⁰ This is not new for Singapore, as the USSFTA, which came into force much earlier, had already envisaged open hearings.⁸¹

The EUSFTA includes provisions on the remuneration of arbitrators, linking these to ICSID Regulation standards.⁸² In contrast, the CETA contains more control mechanisms.⁸³ These provisions reflect the EU thinking that the remuneration and expenses of arbitrators would be “based on standards of comparable international dispute resolution mechanisms in bilateral or multilateral agreements.” As explained by the EU, the aim of such provisions is to take “action against spiraling costs through effective limits to the costs of arbitration”, such action being described as a “first in an ISDS mechanism”.⁸⁴

Finally, the EUSFTA will also include provisions governing the conduct of arbitrators, to deal with matters such as conflicts of interest.⁸⁵ This has been the subject of some recent challenges in ICSID arbitrations and the provisions are intended to forestall such challenges in an arbitration. While these are important guiding provisions, they do not appear to address with specificity, for example, challenges which are based on an arbitrator who may have, before appointment, expressed a particular view on relevant legal principles in academic or professional

⁷⁹ Articles 9.15 of the Investment Chapter also encourages amicable settlements of investor-State disputes, while Art. 9.16 provides for mediation (read with Annex 9A) and alternative dispute resolution.

⁸⁰ Article 2, Annex 9.C EUSFTA.

⁸¹ Art. 15.20, USSFTA; entry into force on 1 January 2004—the text and background information are available at: http://www.fta.gov.sg/fta_ussfta.asp?hl=13.

⁸² Art. 9.29 EUSFTA.

⁸³ Para. 9, Annex 1, Rules of Procedure and Code of Conduct, CETA provides: 9. Unless the Parties agree otherwise, they shall meet the arbitration panel within seven working days of its establishment in order to determine such matters that the Parties or the arbitration panel deem appropriate, including the remuneration and expenses to be paid to the arbitrators, which shall be in accordance with WTO standards. Remuneration for each arbitrator’s assistant shall not exceed 50 % of the total remuneration of that arbitrator. Members of the arbitration panel and representatives of the Parties may take part in this meeting via telephone or video conference;

Art. 9.29 of the EUSFTA provides: The fees and expenses of the arbitrators shall be those determined pursuant to Regulation 14(1) of the Administrative and Financial Regulations of the ICSID Convention in force on the date of the initiation of the arbitration.

⁸⁴ European Commission (2013c), p. 3.

⁸⁵ Annex 9-B, Code of Conduct for Arbitrators and Mediators. On such challenges generally, see Daele (2012).

journals or is in a law firm whose other members may be involved in advising related entities.⁸⁶

Other Aspects Related to Investment: Intellectual Property and Medicines

TRIPS-plus FTA provisions,⁸⁷ especially as they pertain to regulation of patenting and sale of pharmaceutical products, have been a source of global debate.⁸⁸ Such provisions provide investors who hold patents and other legal rights in the FTA States to gain legal protection via the FTA's provisions governing IP rights and pharmaceutical product approval licensing, and on ISDS. In many FTAs, IP rights (such as pharmaceutical patents) fall within definitions of protected "investments" under investment provisions, with the result that challenges under ISDS may be brought if a violation of rights related to such investments are claimed.

Under the USSFTA Singapore had already agreed to certain TRIPS-plus commitments. The EUSFTA text of Chapter 11 on *Intellectual Property Rights* appears to impose far fewer TRIPS-plus requirements for these products. However, Chapter 2, *Annex 2-C Pharmaceutical Products and Medical Devices* does impose a number of new disciplines for Singapore relating to, *inter alia*, listing, pricing and reimbursement of pharmaceutical products.⁸⁹

Other ASEAN TPP countries, that the EU is in FTA negotiations with, are Malaysia and Vietnam. The EU FTA negotiators will no doubt be monitoring the IP negotiations of the TPP to assess what these two countries might agree to. By way of general note, it was reported recently that incoming Chilean TPP negotiators have "drawn a red line" (or ceiling) at the US-Chile FTA level of pharmaceutical IP rights protection.⁹⁰

⁸⁶ See for example ICSID, ARB/12/20, *Blue Bank International & Trust (Barbados) Ltd v Venezuela*.

⁸⁷ These refer to FTA provisions which impose intellectual property protection standards that exceed those required under the WTO's *Trade-Related Intellectual Property Rights Agreement* (TRIPS), Annex 1C of the Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 299. TRIPS-plus provisions such as those, which affect the patenting and licensing of pharmaceutical products, have been included in a number of FTAs.

⁸⁸ See, for example, Lindstrom (2010), p. 917; and Collin-Chase (2008), p. 763.

⁸⁹ See Art. 3, *Annex 2-C*; text available at: http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151731.pdf.

⁹⁰ Incoming Chilean Officials Convey TPP Red Lines in Meeting with Froman, Inside US Trade 32 (2014) 7, 14 February 2014.

Conclusion

As the EUSFTA negotiations are the EU's first to be completed among those with ASEAN members, negotiators in the other ASEAN negotiating States will no doubt be studying the released text as a matter of reference, comparison and negotiation. These other members may have offensive and defensive negotiating interests that differ from those of Singapore, so that they may seek some variations in specific areas. Examples of such areas are trade in goods (such as agriculture, machinery and transport equipment) trade in services, government procurement and the level of protection of IPRs, including those relating to pharmaceutical products and services related to their distribution. It is also not clear if they will accept the insertion of an umbrella clause in their treaties with the EU, given that such clauses have led to somewhat surprising (and costly) challenges elsewhere, as mentioned. The investment provisions, given that ASEAN members have varying reservations in past economic agreements, may be a further area in which negotiations may take more time.⁹¹

For States that may have GSP preferences that have an imminent expiry date, there could be an added impetus to conclude a FTA with the EU.⁹² ASEAN States such as Indonesia, Philippines, Thailand and Vietnam are beneficiaries under the EU's 2014 GSP scheme.⁹³ As of 2014, Malaysia no longer benefits under the EU's GSP scheme.⁹⁴

The EUSFTA signals a first between the EU and Singapore in several ways, and may well lead to conclusion of further FTAs soon between other ASEAN members and the EU. For the moment, it would appear that an EU-ASEAN agreement will take some time to materialise.⁹⁵

References

Andreosso-O'Callaghan B, Nicolas F (2008) What scope for an EU-ASEAN Free Trade Agreement? *J World Trade* 42(1):105

⁹¹ See for example the reservations of the ASEAN members made in relation to the ACIA: <http://www.asean.org/communities/asean-economic-community/item/asean-comprehensive-investment-agreement-reservation-list>.

⁹² For example, Thailand's benefits ended in January 2015.

⁹³ See European Commission (Trade) (2014c). Cambodia, Lao PDR and Myanmar are under its EBA programme for; for information on this scheme, see generally Regulation (EU) No 607/2013 of the European Parliament and of the Council of 12 June 2013 repealing Council Regulation (EC) No 552/97 temporarily withdrawing access to generalised tariff preferences from Myanmar/Burma, [2013] OJ L 181/13.

⁹⁴ See European Commission (Trade) (2014d).

⁹⁵ See for example, Andreosso-O'Callaghan and Nicolas (2008), p. 105; and Cuyvers (2007).

- Bernasconi-Osterwalder N (2013) The draft investment chapter of the Canada-EU comprehensive economic and trade agreement: a step backwards for the EU and Canada? 26 June 2013. <http://www.iisd.org/itn/2013/06/26/the-draft-investment-chapter-of-canada-eu-comprehensive-economic-and-trade-agreement-a-step-backwards-for-the-eu-and-canada/>
- Collin-Chase C (2008) The case against TRIPS-plus protection in countries facing AIDS epidemics. *Univ Pa J Int Law* 29(3):763
- Council of the European Union (2013a) Council conclusions on Myanmar/Burma, 3236th Foreign Affairs Council meeting, 22 April 2013. http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151047.pdf
- Council of the European Union (2013b) Conclusions on the comprehensive framework for the European Union's policy and support to Myanmar/Burma, Foreign Affairs Council meeting, 22 July 2013. http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151869.pdf
- Cuyvers L (2007) An EU-ASEAN Free Trade Agreement: reflections on issues, priorities, strategies. CAS discussion paper no 53
- Daele K (2012) Challenge and disqualification of arbitrators in international arbitration. Alphen aan den Rijn: Kluwer Law International
- Dedman MJ (2010) The origins and development of the European Union: 1945–2008. Routledge, London
- Dosenrode S (2012) The European Union after Lisbon. Ashgate, Aldershot
- EU Trade Commissioner (2010) Speech made at the Lee Kuan Yew School of Public Policy on 3 March 2010. http://europa.eu/rapid/press-release_SPEECH-10-58_en.htm
- European Commission (2013a) The economic impact of the EU-Singapore Free Trade Agreement, 2013. http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151724.pdf
- European Commission (2013b) Fact sheet, investment protection and investor-to-state dispute settlement in EU agreements, November 2013. http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf
- European Commission (2013c) Fact sheet, investment provisions in the EU-Canada Free Trade Agreement (CETA). http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf
- European Commission (Trade) (2006) Overview of FTA and other trade negotiations. http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf
- European Commission (Trade) (2014a) Consolidated CETA text. http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf
- European Commission (Trade) (2014b) Draft EU-Singapore FTA, Chapter 9—investment. http://trade.ec.europa.eu/doclib/docs/2014/october/tradoc_152844.pdf
- European Commission (Trade) (2014c) Preferential arrangements, on the EU's new GSP policy for 2014. http://exporthelp.europa.eu/thdapp/display.htm?page=cd/cd_NewGSPAsOf2014.html&docType=main&languageId=EN
- European Commission (Trade) (2014d) Memo, revised EU trade scheme to help developing countries applies on 1 January 2014. http://trade.ec.europa.eu/doclib/docs/2013/december/tradoc_152015.pdf
- EUSFTA (2013) Fact sheet, November 2013
- Hsu L (2011) International investment disputes: ideological fault lines and an evolving Zeitgeist. *J World Trade Invest* 12(6):827
- Hsu L (2014) Investor-state dispute settlement reform – examining the formative aspect of investment treaty commitments: lessons from commercial law and trade law. *Transnatl Disput Manag* 11(1)
- Ikenson DJ (2014) A compromise to advance the trade agenda: purge negotiations of investor-state dispute settlement. *Cato Institute Free Trade Bulletin* no 57. <http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state>
- Jones E, Menon A, Weatherill S (2012) The Oxford handbook of the European Union. Oxford University Press, Oxford
- Koh T, Lin CL (eds) (2004) The US Singapore Free Trade Agreement – highlights and insights. Institute of Policy Studies and World Scientific Publishing, Singapore

- Lay Hwee Y, Latif A (eds) (2000) Asia and Europe – essays and speeches by Tommy Koh. World Scientific Press, Singapore
- Lindstrom B (2010) Scaling back TRIPS-plus: an analysis of intellectual property provisions in trade agreements and implications for Asia and the Pacific. N Y Univ J Int Law Polit 42(3):917
- OECD (2004) Fair and equitable standard in international standard in international investment law. www.oecd.org/daf/inv/investment-policy/33776498.pdf
- Petchanet Pratuangkrai (2014) ASEAN to resume FTA talks with EU after AEC in place, says chief, The Nation, 11 March 2014. <http://www.nationmultimedia.com/business/Asean-to-resume-FTA-talks-with-EU-after-AEC-in-pla-30228867.html>
- Pollet-Fort A (2011) The EU-Korea FTA and its implications for the future EU-Singapore FTA, background brief no 4
- UNCTAD (2012) Fair and equitable treatment. <http://unctad.org/en/pages/PublicationArchive.aspx?publicationid=326>
- Voskamp B (2013) EU-Singapore Free Trade Agreement: the missing chapter, 22 November 2013. <http://www.internationallawoffice.com/newsletters/detail.aspx?g=ce2c9010-9efb-45cc-99d1-744f0e8742d9>
- Ying CZ, Tan W (2001–2011) Trends in Singapore’s inward and outward direct investment, 2001–2011. Singapore department of statistics (2013). <http://www.singstat.gov.sg/publications/publications-and-papers/economy>